Oh, Brother! A California Appeals Court Reaffirms the Denial of Necessary Access for Separated Children to Build and Maintain Sibling Relationships

In re Miguel A.[1]

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[1] 67 Cal. Rptr. 3d 307 (Cal. Ct. App. 2007).

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I. Introduction

[W]hile brothers and sisters may not have a legal right . . . to share each other's lives, and to grow up together, certainly they have a natural right to do so.[2]

A child who grows up without siblings will likely never fully understand the value of sibling relationships. Yet, for other children, "[t]he sibling relationship will likely be the longest and most significant relationship" of their lives.[3] This note concerns a child somewhere in the middle: He entered the world preceded by a biological brother, but before he was born the state removed his brother from the care of their biological mother. The state did this after their mother neglected his brother. The state terminated their mother's legal rights to his brother in a proceeding designed to protect his brother, and along with the mother's legal rights as to the brother, so went the child's.

When a state institutes a proceeding in the interest of protecting a child, the state refers to the child using a word or phrase that varies by jurisdiction. In Iowa, the phrase is "child in need of assistance";[4] in Vermont, the phrase is "child in need of care or supervision";[5] in California, the word is "dependent";[6] and so on. *In re Miguel A.* is a California Court of Appeals case that took place pursuant to the state's proceedings involving a dependent, Miguel, and his attempt to attain visitation with his brother, whom the state removed

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[2] Ellen Marrus, *"Where Have You Been, Fran?" The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 991 (1999) (quoting Arons v. Arons, 94 So. 2d 849, 853 (Fla. 1957)).

[3] Joel V. Williams, *Sibling Rights to Visitation: A Relationship Too Valuable to Be Denied*, 27 U. TOL. L. REV. 259, 261, 281 (1995) (citing THOMAS H. POWELL & PEGGY A. GALLAGHER, BROTHERS AND SISTERS – A SPECIAL PART OF EXCEPTIONAL FAMILIES 16 (2d ed. 1992)).

[4] *See* IOWA CODE ANN. ch. 232 (West Supp. 2008).

[5] VT. STAT. ANN. tit. 33, § 5319, *et seq.* (West Supp. 2008).

[6] *See* CAL. WELF. & INST. CODE § 300, *et seq.* (West Supp. 2008).

from the custody of Miguel's mother and placed with an adoptive family prior to Miguel's birth.[7]

II. Facts & Holding

The instant action began when Miguel A. ("Miguel"), the biological son of the defendant-respondent Catherine A. ("Catherine"), filed a petition in juvenile court against the Imperial County (California) Department of Social Services (DSS).[8] Miguel, a dependent of the juvenile court, petitioned DSS for the right to visitation with Catherine's older biological son, Jose.[9]

Catherine gave birth to Jose in October of 2002.[10] In December of that year, DSS took Jose into protective custody;[11] the next month it filed a dependency petition on his behalf.[12] Initially, Catherine pleaded no contest to the charges presented at the hearing pursuant to Section 366.26.[13] The state then provided reunification services for Catherine and Jose.[14] However, the state terminated reunification services at the second six-month review hearing, and consequently

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[7] *In re* Miguel A., 67 Cal. Rptr. 3d 307, 391 (Cal. Ct. App. 2007)
[8] *Id*. Procedurally, the DSS appears in this action as plaintiff-respondent.
[9] *Id.* at 391-92. Miguel filed the petition pursuant to CAL. WELF. & INST. CODE § 388 (Subsection (b) states: "Any person, including a child who is a dependent of the juvenile court, may petition the court to assert a relationship as a sibling related by blood, adoption, or affinity through a common legal or biological parent . . . .").
[10] *Miguel A.*, 67 Cal. Rptr. 3d at 392. Catherine was, herself, a dependent of the juvenile court until 2005. *Id.*
[11] *Id.* For an in-depth look at the intricacies of California dependency proceedings, *see infra* Part IIIA.
[12] *Id.* DSS filed the dependency petition pursuant to CAL. WELF. & INST. CODE §§ 300(b), (g). Subsection (b) provides for relief for children who are at risk of serious injury or illness because of a parent's inability to care for him; Subsection (g) provides relief where "[t]he child has been left without any provision for support. . . ." *Miguel A.*, 67 Cal. Rptr. 3d at 392. Section 300 provides the juvenile court with jurisdiction over all children made dependents therein. *See generally id.*
[13] *Id. See also* CAL. WELF. & INST. CODE § 366.26. Essentially, DSS charged Catherine with putting Jose at risk through her inability to properly care for him.
[14] *Miguel A.*, 67 Cal. Rptr. 3d at 392. *See generally* CAL. WELF. & INST. CODE § 300.1.

terminated Catherine's parental rights as to Jose in January of 2004.[15]

Catherine gave birth to Miguel in June of 2004.[16] In April of 2005, DSS filed a dependency petition on Miguel's behalf, after Catherine left Miguel with relatives who could not care for him.[17] The juvenile court then denied Catherine reunification services, just as it had done with Jose in June of 2005.[18] However, in November of that year, Catherine resurfaced and successfully filed for resumption of reunification services.[19] By October of 2006, the state had returned custody of Miguel to Catherine.[20]

Miguel's attorney filed Section 388 petitions on behalf of both Miguel and Jose for sibling visitation.[21] Finding the dual representation to be a conflict of interest, however, that attorney eventually withdrew, and the court appointed separate attorneys for Miguel and Jose.[22] Soon thereafter, Jose's attorney withdrew his petition.[23] The court then denied Miguel's petition, reasoning that because Catherine's parental rights as to Jose had been terminated prior to Miguel's birth, Miguel and Jose had no legal sibling relationship.[24] Miguel

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[15] *Miguel A.*, 67 Cal. Rptr. 3d at 392. "A finding . . . that reunification services shall not be offered . . . shall constitute a sufficient basis for termination of parental rights." CAL. WELF. & INST. CODE §§ 366.26(c)(1). Pursuant to Section 395, Catherine sought judicial review if the termination in the Court of Appeals. *In re* Jose A., No. D043820, 2004 WL 1240605, at *1 (Cal. Ct. App. June 7, 2004). The court declined. *Id.*
[16] *Miguel A.*, 67 Cal. Rptr. 3d at 392.
[17] *Id.* Moreover, Catherine could not be found. *Id.* Once again, DSS filed for dependency pursuant to CAL. WELF. & INST. CODE §§ 300(b), (g). *Id.*
[18] *Id.*
[19] *Id.* Catherine filed a "section 388 modification petition" which may be filed by "[a]ny parent or other person having an interest in a child . . . upon grounds of change of circumstance or new evidence" to modify a previous order or terminate the court's jurisdiction. CAL. WELF. & INST. CODE § 388(a).
[20] *Miguel A.*, 67 Cal. Rptr. 3d at 393.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* Note that under Section 388, a petitioner must "assert a relationship as a sibling . . . ." CAL. WELF. & INST. CODE § 388(b). The court stated that

appealed.[25] The California Court of Appeals held that, although the juvenile court erred in determining no sibling relationship existed between Miguel and Jose, the court's order denying visitation had to be affirmed because the juvenile court did not have jurisdiction to order visitation with Jose.[26]

III. Legal Background

When a child becomes a dependent of the state due to her parents' lack of fitness, the dependency can ultimately sever ties between that child and her biological siblings.[27] If a sibling wishes to maintain a relationship with the dependent child,[28] she must convince the juvenile court that visitation would be in the dependent child's best interests.[29] First, however, the court must decide whether to even *entertain* her petition, based on jurisdictional and other factors.[30] A look at

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"minors are not siblings if they did not concurrently share a common parent." *Miguel A.*, 67 Cal. Rptr. 3d at 393.

[25] *Id.*

[26] *Id.* at 397. The appeals court did not explain this ruling; it merely asserted, in one sentence, the juvenile court's lack of jurisdiction over Jose. *Id.*

[27] *See, e.g.*, Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 319, 320 (2004). Note that California severed ties between Miguel and his brother before Miguel was even *born*. *See generally Miguel A.*, 67 Cal. Rptr. 3d 307.

[28] Note that the reverse situation also prevalently arises – where a dependent child seeks to maintain his relationships with non-dependent siblings, as in *Miguel A. See also In re* Dependency of M.J.L., 96 P.3d 996 (Wash. Ct. App. 2004).

[29] This is virtually a universal requirement. *See, e.g.*, *In re* Adoption of Rico, 889 N.E.2d 974, 979 (Mass. App. Ct. 2008) (judge must "make explicit" his findings as to the child with whom siblings seek visitation); *In re* Adoption of Candace, 751 N.E.2d 454 (Mass. App. Ct. 2001) (court declines to disturb lower court's denial of sibling visitation because of lack of evidence that visitation would be in the child's best interests); Keenan R. v. Julie L., 831 N.Y.S.2d 435, 435 (N.Y. App. Div. 2007) (court must consider in a hearing whether sibling visitation would be in a child's best interests).

[30] *See, e.g., In re* Tamara R., 764 A.2d 844 (Md. Ct. Spec. App. 2000) (court allows sibling's petition for visitation on grounds that statute requires jurisdiction as to only one sibling in order to provide sibling

California's dependency laws illustrates how dependency actions take place, and what procedures courts follow in conducting them.

A. Dependency Procedure in California[31]

A California child-dependency proceeding begins when an "authorized peace officer . . . acting on reasonable cause to believe that the child is in 'immediate danger' . . . temporarily removes a child from his or her home."[32] The peace officer then has forty-eight hours to either return the child to his home, or to file a dependency petition with the juvenile court alleging the harm to the child.[33] The same day the officer files the petition, the juvenile court must hold a detention hearing to decide on further action regarding the child.[34]

In the detention hearing, the state must prove (a) that the child comes within the jurisdiction of the court,[35] and (b) that removal is necessary to prevent harm, that the parent[36] is likely to flee with the child, or that the child is unwilling to return home.[37] Even if the state is successful, the court must further determine if "reasonable efforts were made to prevent

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visitation); Ken R. *ex rel.* C.R. v. Arthur Z., 682 A.2d 1267, 1270 (Pa. Super. Ct. 1996) (siblings denied right to petition for visitation because they lacked standing). Note that due to the young ages of many children seeking visitation with their siblings, representatives, such as state attorneys and guardian ad litems, often bring these petitions on the children's behalves, as in *Miguel A.*

[31] For a more general description of dependency proceedings across jurisdictions, *see* Marrus, *Fostering Family Ties*, *supra* note 27, at 325-37.

[32] Mari D. Parlade, *Termination of Parental Rights: The Terminus of Juvenile Dependency Proceedings*, 16 J. CONTEMP. LEGAL ISSUES 317, 317-18 (2007). *See also* CAL. WELF. & INST. CODE § 300 (West Supp. 2008) (providing ten different descriptions of possible harm to a child).

[33] Parlade, *supra* note 32, at 320 (citing CAL. WELF. & INST. CODE §§ 311, 313(a), 332).

[34] *Id.* (citing § 315). The peace officer must attempt to locate and notify the child's parent(s). *Id.* (citing §§ 307.4, 311).

[35] Section 300 provides the bases which provide the court with jurisdiction.

[36] For the sake of simplicity, the author has written this section as if all children of whom the state takes custody have two parents. This is often not the case.

[37] Parlade, *supra* note 32, at 320 (citing § 319).

or eliminate the need for removal" and "whether there are available services that would prevent the need for further detention."[38] If the answer to the latter is "yes," the court must return the child to his home and order that the state provide such services.[39] If the answer is "no", the court will order that the child remain in the state's custody and that the state provide services aimed at reunifying the child with his parents in the short term.[40]

The court then holds a jurisdictional hearing to fully determine the merits of the state's dependency petition.[41] If the state establishes jurisdictional grounds,[42] the court declares the child a dependent of the court.[43] Then the court must hold a dispositional hearing to determine a more permanent placement for the child.[44] At this hearing, the court will return the child to his home unless the state can prove by clear and convincing evidence that she should remain outside the home.[45]

If the court keeps the child in state custody, and the parents do not consent to termination of their rights, the court must order that the state provide long-term reunification services.[46] The first step in the reunification process involves

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[38] *Id.* at 321 (quoting § 319(d)(1)).
[39] *Id.* (citing § 319(e)).
[40] *Id.* (citing § 319(e)). These reunification services are distinct from those discussed *infra* note 15 and accompanying text.
[41] *Id.* (citing § 334). If the child is to remain in protective custody following the detention hearing, the jurisdictional hearing must take place within 15 days of the filing of the dependency petition. *Id.* If not, it must take place within 30 days. *Id.*
[42] *See supra* note 35 and accompanying text. The state must show by a preponderance of the evidence that the matter satisfies one of the jurisdictional grounds. Parlade, *supra* note 32, at 321 (citing § 356).
[43] *Id.*
[44] *Id.* (citing § 358(b)). This must take place within 30 days of the jurisdictional hearing, or 10 days if the child remains in protective custody. *Id.*
[45] *Id.* at 321-22 (citing §361(c)(1)-(5)). For example, a child should not return home if faced with "substantial harm" in doing so. *See* §361(c)(1). In addition, the state must show that it has made reasonable efforts to eliminate the need of removal. Parlade, *supra* note 32, at 322.
[46] *Id.* (citing §§ 361.5(b-c)).

the state creating a reunification plan specifically tailored to identifying and eliminating the conditions leading to the removal of the child.[47] Thereafter, the court must hold review hearings "at least every six months to assess the parents' progress with reunification."[48] At each review hearing, the court presumes that the state should return the child to his parents; the state can overcome that presumption by showing that returning the child would substantially risk his safety.[49] If the court determines the child should remain in state custody, it must order either the termination or continuation of reunification services.[50]

If the state maintains custody of the child up to the twelve-month review hearing, the court may order a permanency plan hearing if the parents have not substantially complied with the plan.[51] Alternatively, the court may extend reunification services for six more months.[52] In that case, the court must make final determination at the eighteen-month hearing, either permanently returning the child to his parents, or ordering a permanency plan hearing.[53] "Once the court orders a permanent plan hearing, the focus shifts away from reunification and towards meeting the child's need for permanence and stability."[54]

When the court orders a permanency plan hearing, it simultaneously terminates reunification services.[55] The court must choose between one of three options: termination of parental rights, which leads to adoption of the child;

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[47] *Id.* (citing *In re* Ronell A., 52 Cal. Rptr. 2d 474 (Cal. Ct. App. 1996)).
[48] *Id.* (citing §§ 366, 366.21).
[49] *Id.* (citing § 366.21(e)).
[50] *Id.* at 323 (citing § 366.21(e)). If the court opts for continuation, reunification services last for six more months, after which the court holds another hearing – note, though, that reunification services may not continue for more than 18 months. *Id.*
[51] *Id.* (citing §§ 361.5(a)(1), 366.21(f)).
[52] *Id.* (citing § 366.21(g)(1)) (extension is contingent on the parents showing a "substantial probability" of reclaiming the child within six months).
[53] *Id.* (citing § 366.21(g)).
[54] *Id.* (citations omitted).
[55] *Id.*

establishment of a legal guardianship over the child; or provision of other long-term foster care.[56] Courts prefer adoption to the other two options, and if a court finds a child adoptable, it must terminate parental rights.[57]

Ideally, the function of a juvenile dependency hearing is "to balance the child's fundamental interest in a secure and stable home with the parent's fundamental interest in . . . care, custody and management of his or her child."[58] The next section more closely addresses parental interests, and how they conflict with a child's right to establish and maintain relationships with his siblings.

B. The Conflict between Parents' Rights and Siblings' Rights

"The tensions between finality of adoption, fair play to siblings, and the recognized importance of the sibling relationship . . . are not easily reconcilable."[59] U.S. courts, from the United States Supreme Court on down, have historically guaranteed parents a great deal of autonomy in determining what is best for their children.[60] In *Troxel v. Granville*, the Supreme Court found parental autonomy to be a constitutionally protected liberty interest,[61] specifically providing parents with the ability to substantially control who may visit with their children.[62] This liberty interest applies equally to biological and adoptive parents;[63] therefore, a child's adoptive parents may constitutionally deny his siblings visitation with him under *Troxel*.

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[56] *Id.* at 323-24 (citing § 366.26(b)). If the court chooses guardianship or foster care, the parents may still regain custody at a later date. *Id.* at 324 (citing § 388).
[57] *Id.* (citing *In re* Beatrice M., 35 Cal. Rptr. 2d 162 (Cal. Ct. App. 1994)).
[58] *Id.* at 317.
[59] Degrenier v. Reid, 716 N.E.2d 667, 669 (Mass. App. Ct. 1999).
[60] *See, e.g.,* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (parents have a liberty interest in "establish[ing] a home and bring[ing] up children").
[61] 530 U.S. 57, 66 (2000) (striking down, *as applied*, Washington visitation statute allowing any person to petition for visitation with a child at any time).
[62] *Id.* at 67.
[63] *See, e.g.,* Simmons v. Simmons, 900 S.W.2d 682, 684 (Tenn. 1995)).

Not only do adoptive parents have the legal right to prevent visitation, they also have a plethora of psychological reasons to explain their decisions to that effect. Generally, parents often do not believe it is in their child's best interests to remain in contact with his biological siblings.[64] More specifically, many *adoptive* parents may see visitation between their child and his biological siblings as detrimental to their efforts to instill their family values in the child.[65]

Adoptive parents go to great lengths to transition children from their previous environments and circumstances to their new families.[66] In the case of older adoptive children, it can take adoptive parents weeks, months, and sometimes years to instill their values in adoptive children and eliminate habits the children have formed in homes the state ultimately found unsuitable.[67] Adoptive parents also have a substantial interest in keeping children removed from their biological family environments in order to foster necessary emotional bonding between themselves and the children.[68] All of these interests explain why adoptive parents might seek to prevent visitation between adoptive children and their biological siblings.[69]

While adoptive parents have constitutional rights as parents, courts have held that children have no constitutional right to maintain post-adoption relationships with their siblings, whether adopted or biological.[70] Nevertheless, the

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[64] *See, e.g., In re* Adoption of Rico, 889 N.E.2d 974, 979-80 (Mass. App. Ct. 2008); *In re* Tamara R., 764 A.2d 844 (Md. Ct. Spec. App. 2000); *In re* D.W., 542 N.W.2d 407 (Neb. 1996); *In re* Dependency of M.J.L., 96 P.3d 996 (Wash. Ct. App. 2004)

[65] Interview with Mary Beck, Director of the Domestic Violence Clinic and Clinical Professor of Law, University of Missouri School of Law, in Columbia, Mo. (Sept. 25, 2008). Professor Beck indicated that the older the adoptive child, the more applicable this assessment becomes. *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *In re* Adoption of Pierce, 790 N.E.2d 680, 684-85 (Mass. App. Ct. 2003). *See also* Williams, *supra* note 3, at 265 (noting a split in federal courts as to denial of visitation to siblings).

natural rights and interests of children to cultivate and establish sibling relationships exist to counter-balance the adoptive parents' rights and interests.[71] Although the Supreme Court has declined to consider whether siblings have a constitutional right to maintain their relationships,[72] "there is a continuing trend both in judicial opinions and legislative action to recognize the importance of the sibling bond."[73] For example, "[s]everal lower courts have alluded to the unique relationship of siblings and the state's duty to protect that bond."[74] One court has gone even further, describing the right of siblings to visit with each other as "natural, inherent and inalienable."[75]

Furthermore, "every state . . . considers sibling association among emotionally bonded children an important governmental interest."[76] For example, the California legislature has peppered language favoring sibling relationships throughout the state's Welfare and Institutions Code.[77] Other states have inserted similarly favorable

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[71] *See generally* Marrus, "*Where Have You Been, Fran?*", *supra* note 2.

[72] William W. Patton, *The Status of Siblings' Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 4 (2001). Despite the Supreme Court's lack of guidance, one author nonetheless insists that "siblings posses a fundamental constitutional right to maintain relationships with each other." Barbara J. Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1188 (1993).

[73] Patton, *supra* note 72, at 24 (citations omitted).

[74] Marrus, *Fostering Family Ties*, *supra* note 27, at 342 (citing *In re* Jamie P, No. A098978, 2003 WL 1154197 (Cal. Ct. App. Mar. 14, 2003); *In re* Guardianship of Jordan, 764 A.2d 503 (N.J. Super. Ct. App. Div. 2001)). *See also* Care and Protection of Three Minors, 467 N.E.2d 851, 859-61 (Mass. 1984).

[75] L. v. G, 497 A.2d 215, 222 (N.J. Super. Ct. Ch. Div. 1985).

[76] Patton, *supra* note 72, at 19.

[77] *See, e.g.,* CAL. WELF. & INST. CODE § 16002(b) (West Supp. 2008) (". . . diligent effort shall be made, and a case plan prepared, to provide for ongoing and frequent interaction among siblings until family reunification is achieved, or, if parental rights are terminated, as part of developing the permanent plan for the child."); § 366.26(c)(1)(B)(v) (preventing termination of parental right if termination would cause "substantial interference" with a sibling relationship); § 388(d) ("If it appears that the best interests of the child may be promoted by . . . recognition of a sibling relationship, . . . the court shall order that a hearing be held . . . .").

language in their statutory codes as well.[78] Still, courts have long treated siblings' rights to associate with each other as subservient to parents' rights to guide their children. As the next section makes clear, state legislatures, despite favoring sibling bonds, generally have not acted to expand siblings' rights to build and maintain those bonds.[79]

C. Sibling Visitation Rights among the States: A Survey

"[E]very state . . . considers sibling association among emotionally bonded children an important governmental interest."[80] Nevertheless, not every state provides children with the statutory right to petition or be heard to prevent dependency proceedings or post-dependency adoptions from destroying their sibling bonds.[81]

At the outset, the issue of sibling visitation presents two statutory implications: If a sibling who is not the subject of a dependency action seeks visitation with a child who is, the question is whether the sibling has standing to bring the action.[82] On the other side, if a child subject to a dependency action seeks visitation with a sibling who is not involved in the dependency, the question is whether the court has jurisdiction to order visitation.[83] As to the jurisdictional issue, very few states have enacted statutes that expressly provide courts with jurisdiction to order sibling visitation in certain circumstances.[84] Conversely, most states that have sibling

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[78] *See generally infra* Part III.C.

[79] This is true even though "without a sibling access/visitation statute, most state courts are unable to prevent a parent from arbitrarily denying siblings access to one another." Williams, *supra* note 3, at 261.

[80] Patton, *supra* note 72, at 19.

[81] *See generally* Patton, *supra* note 72.

[82] *See, e.g.,* Ken R. *ex rel.* C.R. v. Arthur Z., 682 A.2d 1267, 1270 (Pa. Super. Ct. 1996) (sibling did not have standing to sue for visitation because outside the zone of interests protected by parent- and grandparent-visitation statutes).

[83] This is the situation that arose in *In re Miguel A. See also In re* D.W., 542 N.W.2d 407 (Neb. 1996); *In re* Dependency of M.J.L., 96 P.3d 996 (Wash. Ct. App. 2004).

[84] *See, e.g.,* S.C. CODE ANN. § 20-7-420(A)(44) (2006) (*transferred to* § 63-3-530(A)(44), 2008 S.C. Acts 361) ("The family court has exclusive jurisdiction: . . . [t]o order sibling visitation where the court finds it is in

visitation statutes address jurisdiction implicitly within those statutes.[85] In states that do not have specific sibling visitation statutes, the courts must singlehandedly address questions of jurisdiction.[86]

Where states do address sibling visitation in their statutory codes, the statutory terms vary wildly. In California, one may petition the juvenile court for visitation with a sibling as long as that sibling is a dependent of the court.[87] Nine other states give children the right to personally seek visitation with a sibling in the context of a dependency action. Four of those states explicitly provide a child with the right to petition for sibling visitation rights.[88] For example, Maryland provides that a child may petition for visitation with a sibling as long as *either* the petitioning child *or* his sibling is a dependent or involved in a dependency proceeding.[89] Two more states,

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the best interest [sic] of the children."); OKLA. STAT. ANN. tit. 10, § 5A(C) (West Supp. 2008) ("The district courts are vested with jurisdiction to issue orders granting visitation between siblings and to enforce these orders.").

[85] *See* CAL. WELF. & INST. CODE § 388(b) (West Supp. 2008) ("Any person, including a child who is a dependent of the juvenile court, may petition the court to . . . request visitation with the dependent child . . . .") By the terms of that statute, as the court decided in *In re Miguel A.*, a dependency court may only exercise jurisdiction over a *dependent* child, and not his non-dependent siblings.

[86] *See In re* D.W., 542 N.W.2d 407, 410 (Neb. 1996) (court reversed lower court's sibling visitation order because, as lower court did not have jurisdiction over the non-dependent sibling, the court did not have authority to order the sibling's parents to comply with the order). *See also Ex parte* E.T., 895 So. 2d 271, 278-79 (Ala. Civ. App. 2003).

[87] CAL. WELF. & INST. CODE § 388(b).

[88] *See* IOWA CODE ANN. § 232.108.3 (West Supp. 2008) (a "person who wishes to assert a sibling relationship" may petition "a court with jurisdiction" for visitation with a dependent child); MD. CODE ANN., FAM. LAW § 5-525.2(b)(1) (West Supp. 2008); MASS. GEN. LAWS ANN. ch. 119, § 26B(b) (West Supp. 2008) (a child may petition for visitation with a sibling if *the latter is* a dependent); TEX. FAM. CODE ANN. §§ 153.551(b), 102.0045(a) (Vernon 2007) (a sibling may petition for "access" to a sibling, provided the petitioner is at least 18 years old).

[89] MD. CODE ANN., FAM. LAW § 5-525.2(b)(1). Note that a dependent is a child whom a court has already adjudicated as being dependent – the court's jurisdiction over him inherently extends until an adoption or re-placement with his parents terminates his dependent status. *See, e.g.*, CAL. WELF. & INST. CODE § 300 (West Supp. 2008).

Nevada and Washington, allow all members of a class of interested parties, presumably including siblings, to petition for visitation with a dependent child.[90] The other three states allow children to "be heard" or informally "request" sibling visitation pursuant to a dependency proceeding or post-dependency adoption proceeding.[91]

Although no other states provide children *themselves* with a right to seek sibling visitation, eight states provide that the issue may or shall arise nonetheless. Three of those states provide that a party *other than the child* may petition on the child's behalf.[92] The other five states merely allow courts to

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[90] *See* NEV. REV. STAT. ANN. § 125C.050.7 (West Supp. 2008) (a court "may grant" visitation with a dependent child to a sibling if a petition "is filed" prior to the date parental rights are relinquished or terminated); WASH. REV. CODE ANN. § 13.34.385(1) (West Supp. 2008) (a "relative" may petition if certain conditions exist: The child must be adjudicated dependent and still be dependent at the time of petition, both biological parents must be without parental rights, etc.). In Washington, however, one court has noted that a sibling may not *intervene in a sibling's dependency action* permissively, or as of constitutional or common law right, to maintain her sibling relationship through visitation. *See generally In re* Dependency of L.B., Nos. 48603-9-I, 48602-1-I, 2001 WL 1531103 (Wash. Ct. App. Dec. 3, 2001).

[91] *See, e.g.*, CONN. GEN. STAT. ANN. §§ 17a-15(d), 46b-129(p) (West 2007) (a child whose sibling is the subject of a dependency proceeding has a "right to be heard" regarding visitation with that sibling); FLA. STAT. § 63.0427(1) (2006) (a dependent child whose parents' rights are terminated, pursuant to an adoption proceeding of which the child is the subject, may "have the court consider" visitation and other communication with siblings); ME. REV. STAT. ANN. tit. 22, § 4068.3 (2007) (a child who is subject to a child protection hearing may "request" the right to visitation with a sibling, where the protecting hearing has separated the child from her sibling).

[92] *See, e.g.,* IND. CODE ANN. § 31-28-5-1, *et seq.* (West Supp. 2008) (where at least one child is in state-sanctioned foster care, the state actor responsible for the care of the child may "request" that the court grant visitation between the child and her siblings); OKLA. STAT. ANN. tit. 10, § 5A(A) (West Supp. 2008) (where one parent of a child has died, the other parent may file a petition for visitation between the child and his siblings; the statute explicitly vests state district courts with jurisdiction to grant such sibling visitation); VT. STAT. ANN. tit. 33, § 5319(e) (West Supp. 2008) (effective Jan. 1, 2009) ("[u]pon motion of the child's attorney, the court may . . . order contact between the child and the child's siblings . . . .").

address sibling visitation in certain situations, without requiring a petition, motion or request: three make court consideration mandatory,[93] and two make it permissive.[94]

The other 33 states are less direct as to the availability of sibling visitation rights to children in and following dependency proceedings. Seven states and the District of Columbia merely provide that the court or agency taking custody of a dependent child must *at some point* address and resolve the issue of sibling visitation.[95] An additional six states

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[93] N.H. REV. STAT. ANN. § 169-C:19-d (West Supp. 2008) (the court "shall ensure" that, where visitation is in the best interests of the subject child in a dependency proceeding, the subject child has visitation rights as to her siblings during and following her dependency); N.Y. SOC. SERV. LAW §§ 358-a(a)(11), (b) (McKinney 2007) (in a dependency proceeding, the court "shall inquire" as to whether the state official in charge of the subject child has arranged for sibling visitation, and if not, the court "may direct" that such official do so); VA. CODE ANN. §§ 63.2-912, 16.1-252(F)(2) (West Supp. 2008) (generally, courts have authority to grant visitation right to siblings of dependent children, and specifically, courts in dependency matters "shall . . . [o]rder" that a dependent child have visitation with siblings as long as such visitation "would not endanger the child's life or health").

[94] N.M. STAT. ANN. § 32A-4-22(E) (West Supp. 2008) (the court "may order" visitation between a child placed in state custody and that child's siblings); OR. REV. STAT. ANN. § 419B.337(3) (West Supp. 2008) (the court "may order" visitation between a dependent child and her siblings).

[95] ARIZ. REV. STAT. ANN. § 8-872(H) (Supp. 2008) (in a dependency proceeding, the court "may incorporate" terms of sibling visitation with the dependent child into a final order for permanent guardianship); DEL CODE ANN. tit. 31, § 3814(a)(9) (West Supp. 2008) (administrative review of placement of a dependent child must contain consideration of the dependent child's opportunity to visit with siblings); D.C. SUPER. CT. R., FAM. DIV., NEGLECT AND ABUSE PROCEEDINGS 22 (in a dependency proceeding, the agency's dispositional report must include any terms for sibling visitation); MICH. COMP. LAWS ANN. § 712A.13b(2)(d)(iv) (West Supp. 2008) (where the placement of a dependent child changes, the agency must notify the dependency court and the child's lawyer as to whether the change will affect sibling visitation); MINN. STAT. ANN. § 260C.212(1)(a)(5) (West Supp. 2008) (where the court recommends that a dependent child be placed outside her home, the state must include in its placement plan report a plan for visitation between the child and any siblings not placed with her); MO. R. JUV. P. 111.14(g)(9) (at protective custody hearing for a child, the court must "consider and enter orders" as to whether visitation should occur between the child and her siblings); *e.g.*

give visitation rights to a child or other relative in some form, but not in the specific context of a dependency proceeding.[96] Ohio law provides one unique example of this, such that where an unmarried woman gives birth to a child whom a court subsequently removes from the biological mother's custody, any other relative of that woman may file a petition for visitation with that child.[97] It is noteworthy, however, that not only has one court declared this statute unconstitutional as applied, it also may violate parents' constitutional rights under *Troxel v. Granville*.[98] Colorado and Louisiana provide sibling visitation rights only pursuant to the adoption of a dependent

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N.C. NASH COUNTY JUV. R. 8A(c)(5) (individual counties in North Carolina provide that in dependency cases considering the state's "continued custody" of a child, "the judge shall explore" the issue of sibling visitation with the parties); S.C. CODE ANN. § 63-3-530(a)(44) (West Supp. 2008) (plans for placement of dependent child must include sibling's visitation rights as to that child).

[96] Usually, these statutes pertain to actions upon a failed marriage, such as dissolutions and separate child custody contests. *See, e.g.*, ARK. CODE ANN. § 9-13-102 (West Supp. 2008) (statute within "Child Custody and Visitation" subchapter, without further providing the actions to which the statute applies, allows a child of at least 18, or otherwise a parent, to petition for visitation with a child's sibling where the sibling's parents have denied access); HAW. REV. STAT. § 571-46(a)(7) (West Supp. 2008) (where custody disputes arise in marriage dissolution-related actions, "visitation rights shall be awarded" to a child's siblings unless those rights would detriment the child); 750 ILL. COMP. STAT. 5/607(a-5)(1) (West Supp. 2008) (when custody matters arise in dissolution actions, "any . . . sibling may . . . petition for visitation rights to a minor child" if the child's parent unreasonably denies visitation *and* at least one of a number of other circumstances exists); N.J. STAT. ANN. § 9:2-7.1(a) (West Supp. 2008) (where custody is in dispute, "any sibling of a child . . . may make application" for visitation with the child), *unconstitutional as applied in* Wilde v. Wilde, 775 A.2d 535 (N.J. Super. Ct. App. Div. 2001)); R.I. GEN. LAWS § 15-5-24.4 (West Supp. 2008) (in a dissolution action, a sibling may file a "miscellaneous petition" with the family court for visitation rights as to a child).

[97] OHIO REV. CODE ANN. § 3109.12(A) (West Supp. 2008), *unconstitutional as applied in* Nicoson v. Hacker, No. 2000-L-213, 2001 WL 1602666 (Ohio Ct. App. Dec 14, 2001)).

[98] *See* discussion *supra* Part III.B.

child, and only by agreement between the adoptive parents and the party seeking the visitation.[99]

The remaining seventeen states[100] do not specifically address a sibling's right to visitation in any context.[101] Some, however, come close. For example, Montana and Wisconsin require that the importance of sibling relationships factors into a determination as to where the state should place a dependent child.[102] Idaho provides that an agency's permanency plan must maintain a dependent child's "significant relationships" while the child transitions into dependency and into a new home.[103] In West Virginia, courts may provide visitation as to dependent children, but the statute does not mention siblings or any class of which siblings could be a part, such as "relatives."[104] Generally, these states do not contemplate in any context a remedy for a child who desires visitation rights

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[99] COLO. REV. STAT. ANN. § 19-5-210(7) (West Supp. 2008) (courts may encourage agreements between adoptive parents and the party seeking sibling visitation rights); LA. CHILD. CODE ANN. art. 1269.2(A) (West Supp. 2008) (court may approve an agreement for continued contact between a dependent child's siblings and her adoptive parents).

[100] These states are: Alabama, Alaska, Georgia, Idaho, Kansas, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming. Pennsylvania appears among these states because its state statutory code contains no provision as to sibling visitation. But the local rules of one county – Philadelphia – do so provide. *See* Phila. County Ct. C.P., Fam. Ct. Div., Dependency R. 1692(7) (where a dispositional order separates siblings, the Department of Human Services must provide the court with a plan for "frequent sibling visitation").

[101] This number might soon decrease substantially as a result of the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949. This act requires that states attempt to provide visitation to children placed separately outside their homes. *Id.*

[102] MONT. CODE ANN. § 41-3-101(3) (West Supp. 2008) (pursuant to abuse and neglect proceedings, the state department with charge over the child shall consider placing the child with her adult siblings); WIS. STAT. ANN. § 48.38(4)(br) (West Supp. 2008) (permanency plan for dependent child shall include a statement as to the viability of placing her with her siblings).

[103] IDAHO CODE ANN. § 16-1620(3) (West Supp. 2008). Generally, a "permanency plan" represents a state's plan to provide for stability in a child's life, whether it be through reunification, foster care, or adoption.

[104] W.V. R. CHILD ABUSE AND NEGLECT 15.

as to her siblings, although some have considered the issue judicially.[105]

Even in states where statutes specifically provide a child with a right to seek visitation with a sibling, judicial outcomes are often not favorable to the child seeking visitation. The next section explores the jurisprudence of different states, both with and without sibling visitation statutes, and the determinative effects of standing and jurisdiction.

D. Sibling Visitation Jurisprudence – Divergent Methodologies

Where states do have specific sibling visitation statutes, cases seem to turn on the implicit provision of jurisdiction within the statutes.[106] A comparison of

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[105] *See, e.g.*, *In re* Marriage of Yoch, No. 92,390, 92,391, 2006 WL 619176 (Kan. Ct. App. Mar. 10, 2006) (upholding split custody because of visitation maintaining the sibling bond); Scruggs v. Saterfiel, 693 So.2d 924, 926 (Miss. 1997) (declining to equitably extend a right to visitation for siblings where no statutory right exists); *In re* D.W., 542 N.W.2d 407 (Neb. 1996) (reversing and remanding lower court's order of sibling visitation on grounds that court lacked jurisdiction over the non-adjudicated child); *In re* E.J.H., 546 N.W.2d 361, 365 (N.D. 1996) (maintenance of sibling relationship through visitation cited as factor in court's determination that court did not err by splitting custody of two siblings); Ken R. *ex rel.* C.R. v. Arthur Z., 682 A.2d 1267, 1270 (Pa. Super. Ct. 1996) (sibling determined to have substantial and direct interest in maintaining relationship with half-siblings, but interest not found to be *immediate* enough to confer standing); Abrams v. Abrams, 516 N.W.2d 348 (S.D. 1994) (sibling visitation considered as a remedy for the separation of siblings in a divorce); *In re* Christina L., 460 S.E.2d 692 (W. Va. 1995) (parties in parental rights termination proceeding should have addressed what steps could be taken to preserve the sibling bond, such as visitation rights with each other).

[106] For example, California's Section 388(b) grants a child the right to petition and request visitation with a child "who is, or is the subject of a petition for adjudication as, a dependent of the juvenile court. . . ." CAL. INST. & WELF. CODE § 388(b) (West Supp. 2008). The statute implicitly necessitates a court's jurisdiction over the sibling with whom the petitioning child seeks visitation by requiring the sibling to be (or be in a proceeding to become) a dependent of the court. *Id.*

Washington jurisprudence with that of Maryland supports this inference.[107]

In *Dependency of M.J.L.*, the dependent child, M.L., sought visitation with her non-dependent sister, E.L., in a dependency hearing.[108] Even though "it [was] undisputed that the juvenile court had no jurisdiction over E.L.," the juvenile court granted visitation to the siblings upon a social worker's testimony that visitation would be in the children's best interests.[109] The girls' father appealed.[110] Citing the parents' constitutional right to autonomous custody of their children, the appeals court ruled that without jurisdiction over the child who would be subject to the visitation order, the juvenile court "did not have the power to order the parents to comply with" the visitation order.[111]

Factually, *In re Tamara R.* was not dissimilar from *M.J.L.* Tamara, a dependent child, petitioned for visitation with her two non-dependent siblings still in their father's custody.[112] As in *M.J.L.*, the court took stock of the father's constitutionally protected parental rights,[113] and the validity of

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[107] *Compare In re* Dependency of M.J.L., 96 P.3d 996 (Wash. Ct. App. 2004), *with In re* Tamara R., 764 A.2d 844 (Md. Ct. Spec. App. 2000). Note that both Washington and Maryland have specific statutes allowing a child to petition for visitation with a sibling. *See supra* notes 88-90.

[108] *M.J.L.*, 96 P.3d at 997. Section 13.34.385(1) of the Washington Revised Code provided M.L. with the right to petition. WASH. REV. CODE ANN. § 13.34.385(1) ((West 2007) (a "relative" may petition if certain conditions exist, including past termination of both parents' rights). The girls' biological father, E.L.'s legal guardian, contested the petition. *M.J.L.*, 96 P.3d at 997.

[109] *M.J.L.*, 96 P.3d at 998.

[110] *Id.*

[111] *Id.* (a fit parent "has a right to limit visitation of his or her children with third persons.").

[112] 764 A.2d 844, 846 (Md. Ct. Spec. App. 2000). As in *M.J.L.*, the father contested visitation. *Id* at 846. Section 5-525.2(b)(1) of the Maryland Family Law Code gave Tamara the right to petition. MD. CODE ANN., FAM. LAW § 5-525.2(b)(1) (West Supp. 2008) (a child may petition for visitation with a sibling as long as the court has jurisdiction over the petitioner or the sibling).

his denial of visitation.[114] However, the court also emphasized the importance of sibling relationships[115] and disagreed that a parent could preclude visitation merely by opposing it.[116] Specifically, the court directed that lower courts allow a sibling, who faces parental opposition to a visitation request, to overcome that opposition using evidence that visitation would serve the children's best interests.[117]

The main analytical difference between *M.J.L.* and *Tamara R.* lies in the distinction between Washington's and Maryland's statutory sibling visitation provisions. Washington's version provides that a "relative of a *dependent child* may petition" for visitation with *that child*.[118] The explicit language of the statute appears to bestow upon a non-dependent child standing to petition for visitation rights with a dependent child.[119] The court in *M.J.L.* merely construed Washington's visitation statute according to its express terms.[120] *M.J.L.* comports with other case law in which courts in sibling visitation statute jurisdictions deny petitions for lack of jurisdiction over one child.[121] On the other hand, Maryland's statute is less constrictive, giving a child the right

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[114] *Tamara R.*, 764 A.2d at 846, 847 (court must balance a "sibling's need for visitation against the constitutional rights of a parent who opposes it . . .") ("[T]here is no justification legally to court order and force the visitation of minor children who are in the custody of a parent who is presumed to be raising them in the manner in which he sees fit.").

[115] *Id.* at 855-56.

[116] *Id.* at 853. The court added that the father, in the juvenile court, had a chance to present any arguments as to visitation not being in his daughters' best interests, in order to protect his parental interest. *Id.*

[117] *Id.* at 857.

[118] WASH. REV. CODE ANN. § 13.34.385(1) (West Supp. 2008) (emphasis added).

[119] *Id.* Note that the dependent child comes within the jurisdiction of the court naturally, by her dependency.

[120] *See generally In re* Dependency of M.J.L., 96 P.3d 996 (Wash. Ct. App. 2004). Had the situation been reversed, and M.L.'s *non-dependent* petitioned for visitation with M.L., a dependent, the court certainly would have accepted the petition, provided the circumstances comported with the other statutory conditions. *See* WASH. REV. CODE ANN. § 13.34.385(1).

[121] *See, e.g.*, *In re* Davonta V., 940 A.2d 733, 739-40 (Conn. 2008). Cases denying sibling visitation petitions are far more prevalent in jurisdictions lacking visitation statutes. *See* discussion beginning *infra* note 126.

to petition for visitation with a sibling as long as the juvenile court has "jurisdiction over *one or more* of the siblings."[122] Though the Washington Court of Appeals in *M.J.L.* had to deny M.L.'s petition for lack of jurisdiction over E.L. under Washington state law, the Maryland Court of Appeals in *Tamara R.* had the ability to consider Tamara's petition merely because it had dependency jurisdiction over Tamara, despite its lack of jurisdiction over the sibling with whom visitation was sought.

The dichotomy between *M.J.L.* and *Tamara R.* is not a common one, since most states do not have sibling visitation statutes to guide courts at all.[123] However, petitioners still present the issue for state courts to decide. These cases often turn on the issue of either (1) whether the court can exercise jurisdiction over the petitioning child, the child with whom visitation is sought or both, or (2) whether the petitioning child has standing to bring the petition.

In re Interest of D.W. is an example of a case turning on jurisdictional grounds.[124] In *D.W.*, a dependent child's guardian ad litem requested that the juvenile court provide D.W. visitation with his non-dependent sister, who remained in their father's custody.[125] The juvenile court granted the petition and ordered D.W.'s parents to make their daughter available for visitation.[126] The father appealed, and the court of appeals affirmed the juvenile court.[127] The Nebraska Supreme Court reversed, reasoning that neither the juvenile court nor the appeals court "had the power to order the parents to comply with the . . . visitation order" because the courts

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[122] MD. CODE ANN., FAM. LAW § 5-525.2(b)(1) (West Supp. 2008) (emphasis added).
[123] *See supra* Part III.B.
[124] 542 N.W.2d 407 (Neb. 1996) ("D.W."). Nebraska does not address sibling visitation in its statutory code. *See supra* note 105 and accompanying text.
[125] *D.W.*, 542 N.W.2d at 409. The father and his wife opposed visitation on the grounds that it was not in their daughter' s (D.W.'s sister's) best interests. *Id.*
[126] *Id.*
[127] *Id.*

lacked jurisdiction as to D.W.'s sister.[128] Without mentioning the court's analysis of the Maryland sibling visitation statute in *Tamara R.*, the court dismissed the viability of a statute like Maryland's and exclaimed that "[j]ust because one child in a family is adjudicated as a child coming under the Nebraska Juvenile Code does not provide a juvenile court carte blanche jurisdiction over the adjudicated child's non-adjudicated siblings."[129]

The same result is typical in cases turning on standing, although the analysis differs slightly. For example, in *Ken R. on behalf of C.R. v. Arthur Z.*, a Pennsylvania court addressed a child's request that the court grant him visitation with his sibling.[130] The court admitted that, for standing purposes, the child did have a "substantial" and "direct interest" in maintaining a relationship with his sibling.[131] Ultimately, however, the court denied the child's request.[132] The court explained that the child's interest was not within the "zone of interests" protected by the applicable state statute, which only provided visitation rights to parents and grandparents.[133]

Furthermore, state courts, in the absence of statutes directing them as to sibling visitation, may look to equity, rather than jurisdiction or standing, to determine a proper resolution. Case law from New Jersey and Mississippi, each without a guiding sibling visitation statute, shows the different outcomes possible under this method.[134] In the New Jersey case of *L. v. G.*, a group of adult siblings petitioned for visitation with their minor siblings who remained in the custody of their father and stepmother.[135] Citing the "precious . . . emotional and biological bonds which exist between siblings . . .," the court exercised equitable jurisdiction in the

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[128] *Id.* at 410.
[129] *Id.*
[130] 682 A.2d 1267 (Pa. Super. Ct. 1996).
[131] *Id.* at 1270.
[132] *Id.*
[133] *Id.*
[134] *Compare* L. v. G, 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985), *with* Scruggs v. Saterfiel, 693 So.2d 924 (Miss. 1997).
[135] *L. v. G.*, 497 A.2d at 216.

absence of an applicable statute to grant the adult siblings' petition.[136] The court in *Scruggs v. Saterfiel*, a Mississippi case, reached a different conclusion.[137] There, a dependent child petitioned for visitation with her half brother, who remained in their father's custody.[138] Although the court recognized siblings' "important" interest in associating, it declined to equitably extend visitation rights to siblings in the absence of a statutory right.[139]

California courts need not worry about equitable jurisdiction because the state legislature has provided them with considerable guidance in adjudicating sibling visitation requests.[140] The holding of *In re Miguel A.* indicates California's position alongside states like Connecticut, Massachusetts and Washington, whose sibling visitation statutes allow courts to grant visitation requests only if the non-petitioning sibling comes within court jurisdiction.[141] And although the jurisdictional issue determined the outcome of *Miguel*, the court's opinion predominantly addressed whether a legally recognizable sibling relationship existed between Miguel and Jose.[142]

IV. Instant Decision

In *Miguel* the California Court of Appeals noted that it could have dismissed Miguel's appeal as moot upon the adoption of Jose, resulting in the dismissal of Miguel's sibling visitation petition.[143] Instead, the court exercised its discretion

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[136] *Id.* at 218. The court went further: "This court finds that siblings possess the natural, inherent and inalienable right to visit with each other." *Id.* at 222.
[137] *See generally Scruggs*, 693 So.2d 924.
[138] *Id.* at 925.
[139] *Id.* at 926.
[140] *See, e.g.*, CAL. WELF. & INST. CODE §§ 300, 388(b) (West Supp. 2008).
[141] *In re* Miguel A., 67 Cal. Rptr. 3d 307 (Cal. Ct. App. 2007). *See also* CONN. GEN. STAT. ANN. § 17a-15(d) (West Supp. 2008); MASS. GEN. LAWS ANN. ch. 119, § 26B(b) (West Supp. 2008); WASH. REV. CODE ANN. § 13.34.385(1) (West Supp. 2008).
[142] *See generally id.*
[143] *Id.* at 308. As DSS argued, Miguel's appeal was moot because "[t]he juvenile court no longer ha[d] jurisdiction in Jose's case and therefore [could]not order visitation with him." *Id.*

to consider Miguel's petition for sibling visitation, because the juvenile court's dismissal of it "raise[d] important issues . . . capable of repetition but likely to evade review."[144] The compelling issue for the court was "whether the termination of parental rights in a juvenile dependency case severs the sibling relationship between that child and his or her biological brothers and sisters."[145]

The court first turned to Section 388(b) of the California Welfare and Institutions Code, which allows a child to petition a juvenile court "to assert a relationship as a sibling by blood . . . through a common legal or biological parent" and request visitation with the sibling.[146] The court accepted the lower court's conclusion that Miguel and Jose no longer shared a common *legal* parent, since a court terminated Jose's legal relationship with his mother when it terminated her parental rights as to Jose.[147] Nonetheless, the court reasoned that Miguel and Jose still had a common *biological* parent under Section 388(b), as "an order terminating parental rights has no effect on the relationships between the child and other biological relatives."[148]

The court next delved into California's public policy favoring preservation of sibling relationships.[149] The court emphasized the legislature's stated intent, in amending Section 388 to include subsection (b), to "preserv[e] and strengthen[]

[144] *Id.* (quoting *In re* Lemanuel C., 58 Cal. Rptr. 3d 597, 599 (Cal. 2007)).
[145] *Id.* The juvenile court found that, as a matter of law, Miguel and Jose were not siblings. *Id.* at 309.
[146] *Id.* (citing CAL. WELF. & INST. CODE § 388(b) (West 2007)). The court noted: "It is not a prerequisite of Miguel's sibling relationship with Jose that they concurrently share a common parent." *Id.* at 310.
[147] *Id.*
[148] *Id.* (citing *In re* Baby Girl D.S., 600 A.2d 71, 84 (D.C. 1991)). The court "assume[d]" that "[b]y including both 'legal' and 'biological' parents" in the statute, the legislature intended to "distinguish[] between two types of kinship." *Id.*
[149] *Id.* (citations omitted).

family ties" and "improve the treatment of [sibling] relationships. . . ."[150]

Lastly, the court cited the precedent of *In re Valerie A.*,[151] in which a juvenile court, pursuant to a termination hearing, found the mother's older daughter not to be a sibling as to the mother's younger twin daughters.[152] That appellate court reversed and remanded to the juvenile court to permit evidence as to the sibling relationship.[153] The *Valerie A.* court also noted that children "separated by the dependency process do not cease to be brothers and sisters for purposes of preserving relationships important to all of the affected children."[154] In the instant case, DSS argued that the court should distinguish this case from *Valerie A.* because Miguel's mother gave birth to him *after* she lost her parental rights as to Jose.[155] The court rejected this argument, reiterating that Jose and Miguel still shared a biological mother, and "*Valerie A.* is not restricted to siblings who have a preexisting relationship."[156]

Despite its determination that a sibling relationship did exist between Miguel and Jose, the court affirmed the juvenile court's dismissal of Miguel's petition on the grounds that the juvenile court lacked jurisdiction over Jose, and therefore lacked jurisdiction to enter a visitation order as to Jose.[157] Additionally, the court noted that, notwithstanding the jurisdictional defect, Miguel's petition might not have

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[150] *Id.* at 310-11. The court further noted the enactment of Section 366.26(c)(1)(E), preventing termination of parental rights if the termination would interfere with a sibling relationship. *Id.* at 311.
[151] 43 Cal. Rptr. 3d 734 (Cal. Ct. App. 2006).
[152] *Miguel A.*, 67 Cal. Rptr. 3d at 311 (citing *Valerie A.*, 43 Cal. Rptr. 3d at 737). The lower court did not allow any evidence at the hearing as to the sibling relationships between the older daughter and the twins. *Id.*
[153] *Id.* at 311-12 (citing *Valerie A.*, 43 Cal. Rptr. 3d at 734).
[154] *Id.* at 312 (quoting *Valerie A.*, 43 Cal. Rptr. 3d at 734).
[155] *Id.*
[156] *Id.* ("We see no reason in logic or law to impose a preexisting relationship restriction.").
[157] *Id.*

survived the juvenile court's analysis as to whether visitation would be in the brothers' best interests.[158]

V. Comment

One aspect of *In re Miguel A.* is inherently different from the bulk of jurisprudence considering sibling visitation – the child seeking visitation had not previously established a relationship with his adopted sibling.[159] Still, *Miguel A.* illustrates a paradox present in many sibling visitation cases: On the one hand, the court goes to great lengths to recognize the sibling relationship; on the other hand, the court extinguishes any hope the petitioner has for visitation as a means of establishing or maintaining that relationship, as if it were blowing out a flame. Presumably, Jose's adoptive parents did not consent to Miguel's visitation request – if they had, Miguel's petition would have been unnecessary. Assuming the adoptive parents did oppose visitation, *Miguel A.* was not merely a case that pitted parents' rights against siblings' rights; rather, the disposition indicates a determination that a child does not legally have a right to a relationship with his sibling if that sibling is adopted before that child is born.[160] This comment will (A) contemplate the validity of that indication by analyzing *Miguel A.* through the jurisprudential lenses of other jurisdictions, as established by cases therein, (B) argue for the preservation of sibling relationships even where none exists prior to the adoption of one sibling, and (C) propose that states, including California, ensure protection of siblings' rights both to cultivate and maintain relationships, when separated by dependency or otherwise.

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[158] *Id.* For example, the court pointed out that Miguel and Jose had never had any contact. *Id.*

[159] *See id.* at 309-10.

[160] The court indicates that even if the juvenile court were to accept Miguel's petition, there would be no guarantee that the juvenile court would find sibling visitation to be in Jose's best interests, because of the complete lack of a prior relationship between Miguel and Jose. *See id.* at 312.

A. A View of the Disposition of Miguel A. Using Case Law from Other Jurisdictions

Against California's legislative backdrop, *Miguel A.* is virtually impossible to attack. The court simply could not disagree with the juvenile court's assessment that it lacked jurisdiction to enter an order as to Jose.[161] The terms of Section 388(b) are clear: A child may petition for visitation with a child "who is, or is the subject of a petition for adjudication as, a dependent of the juvenile court."[162] Although Jose was at one time a dependent of the juvenile court, his adoption terminated that dependency, which in turn terminated the juvenile court's ability to exercise jurisdiction over him.[163] California is hardly alone in its treatment of dependent children's visitation petitions seeking visitation with non-dependent siblings.[164]

Under the law of a different jurisdiction, the court could have reached a different result. For example, Maryland law only requires that a juvenile court exercise jurisdiction over one of the siblings subject to a visitation petition.[165] Since Maryland's statute does not mandate that the sibling with whom a child seeks visitation be the one subject to the court's jurisdiction,[166] Miguel's dependency would have satisfied the statute's implicit jurisdictional requirement, and the court would have accepted the petition.[167] However, in a jurisdiction without an applicable statute, like New Jersey, it seems less likely the result would favor Miguel.[168] The decision to

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[161] *See* CAL. WELF. & INST. CODE § 388(b) (West Supp. 2008).
[162] *Id.*
[163] *See Miguel A.*, 67 Cal. Rptr. 3d at 308.
[164] *See, e.g.*, *In re* Dependency of M.J.L., 96 P.3d 996 (Wash. Ct. App. 2004); *In re* D.W., 542 N.W.2d 407 (Neb. 1996). These cases are discussed *supra* Part III.D.
[165] MD. CODE ANN., FAM. LAW § 5-525.2(b)(1) (West Supp. 2008).
[166] *See In re* Tamara R., 764 A.2d 844, 847-48 (Md. Ct. Spec. App. 2000).
[167] This would not offend *Troxel* even if the adoptive parents opposed visitation, because the court could weigh the petition against the parents' opposition in determining whether to ultimately order visitation, thus appeasing *Troxel*'s demand for deference to parental opposition. Troxel v. Granville, 530 U.S. 57, 69-70 (2000). *See also* discussion *infra* Part V.C.
[168] *See* L. v. G, 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985).

exercise equitable jurisdiction is very discretionary,[169] and the court in *L. v. G.* discussed the sibling bonds that existed between the siblings prior to the institution of visitation action.[170]

In the end, had the court in *Miguel A.* directed the juvenile court to accept Miguel's petition, the ultimate outcome – lack of visitation with Jose – likely would not have changed. The court of appeals would have remanded for analysis as to whether visitation would be in Jose's best interests.[171] Given the evidence – for example, that Miguel and Jose's mother demonstrated a total lack of fitness as to Jose,[172] and that Jose's adoption took place prior to Miguel's birth,[173] – the juvenile court likely would have denied the petition nonetheless. Still, in order to ensure that a petitioner like Miguel *has a chance* to succeed on his petition for visitation, courts and legislatures must shift their conception of sibling relationships.[174]

B. The Child's Right to a Sibling Relationship He Never Legally Had

A child like Miguel, born after an adoption had already terminated his sibling's legal relationship to their mother, enters the world with no legal relationship to his brother.[175]

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[169] *See, e.g.*, Scruggs v. Saterfiel, 693 So.2d 924, 926 (Miss. 1997).

[170] *L. v. G.*, 497 A.2d at 218-19. Miguel and Jose had never shared a relationship prior to Miguel's petition, so an analysis similar to *L. v. G.* would not bode well for Miguel.

[171] *See* CAL. WELF. & INST. CODE § 388(b) (West Supp. 2008) (any request as to the dependent child must "be shown to be in the best interest of the dependent child").

[172] This supports Jose's adoptive parents likely contention that visitation would not be in Jose's best interests, in that visitation would subject Jose to the environment from which the state removed him.

[173] That Jose and Miguel did not have a prior relationship to maintain through visitation runs contrary to Miguel's likely contention that visitation would be in his best interests.

[174] A critical preliminary step would be for each state, which has not enacted legislation that addresses the rights of siblings, specifically, or a general class that could include siblings, to enact such legislation.

[175] *See generally In re* Miguel A., 67 Cal. Rptr. 3d 307 (Cal. Ct. App. 2007) (the court implied that, without a common legal relationship with

This circumstance dilutes arguments lauding sibling relationships as to Miguel, because many such arguments posit that an event has separated two siblings who previously shared a bond.[176] But this circumstance should not dilute these arguments – no reason exists to prevent biological siblings like Miguel and Jose from cultivating a meaningful relationship. A child's right to a relationship with a sibling is too important to brush aside, and legislatures should at least encourage courts to consider this inherent importance when considering children's petitions for visitation with their non-dependent siblings.

"Aside from the parent-child relationship, the sibling relationship is the most important relationship in a child's development."[177] "The emotional bonds between siblings are irreplaceable."[178] "If nurtured and maintained, these relationships can provide emotional security, affect the intellectual, social, emotional, and moral development of one another, and offer lifetime companionship."[179] "Many younger siblings depend upon an older sibling for emotional and physical support . . ."[180] "[S]iblings with a relationship have a better chance of forming lasting friendships with each other and with outside peers."[181] These are just a few of the benefits commentators have ascribed to sibling relationships. They make no mandate that one be alive prior to the other's adoption – a biological bond necessitates at least an attempt to

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their mother, Miguel and Jose did not themselves share a legal relationship).

[176] *See, e.g.*, Marrus, *Fostering Family Ties*, *supra* note 27, at 323-33; Jennifer M. Schwartz, *Siblings Torn Apart No More*, 32 MCGEORGE L. REV. 704, 707-11 (2001).

[177] Williams, *supra* note 3, at 260.

[178] Lisa Westergaard, *What's Going to Happen to Us? The Legal Right of Half-siblings to Remain Together Once Their Custodial Parent Has Succumbed to a Terminal Illness*, 70 UMKC L. REV. 471, 477 (2001).

[179] Marrus, *"Where Have You Been, Fran?"*, *supra* note 2, at 987.

[180] Schwartz, *supra* note 176, at 704.

[181] Siblings and Peer Relations, http://library.adoption.com/information/Sibling-Relationships/357/1.html (follow "Siblings and Peer Relations" hyperlink) (last visited Oct. 16, 2008).

cultivate a sibling relationship even where none has existed before.[182]

Despite the importance of the development of sibling bonds, adoptive parents have a constitutional right to oppose visitation between their adoptive child and his biological sibling.[183] And they exercise this right with legitimate concerns in mind.[184] However, courts seem to undervalue the fact that adoptive parents can substantially maintain this right without preventing siblings from petitioning for visitation. With the benefits of sibling relationships in mind, courts need to first *allow* a sibling's petition. *Then* a court should consider parents' opposition, as part of a best interests analysis as to the adoptive child.[185] By also considering the inherent benefits and importance of sibling relationships,[186] courts would move toward a more equitable method of adjudicating sibling visitation requests.

C. An Equitable Model: A Troxel-Conscious Standard Respectful of Unrealized Sibling Bonds

The Maryland Court of Special Appeals disagreed with the parents' rights-oriented argument that sibling visitation was unconstitutional merely if parents opposed it.[187] As a

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[182] *See* Marrus, *"Where Have You Been, Fran?"*, *supra* note 2, at 991. Professor Marrus acknowledges that a child's interest in a sibling relationship where none has previously existed is slightly diminished; however, she notes that "there is definitely research that supports the concept that the bond exits and is strong even when siblings are separated prior to forming any type of relationship." E-mail from Ellen Marrus, Co-Director, Center for Children, Law & Policy, University of Houston Law Center, to author (Nov. 13, 2008, 11:14 CST) (on file with author).

[183] Troxel v. Granville, 530 U.S. 57 (2000). *See also* Simmons v. Simmons, 900 S.W.2d 682, 684 (Tenn. 1995) (holding that adoptive parents have the same liberty interests as biological parents).

[184] *See supra* notes 65-69 and accompanying text.

[185] This sort of balance is preferable to allowing adoptive parents to "arbitrarily deny the sibling relationship". Williams, *supra* note 3, at 261.

[186] This consideration would be irrespective of the subjective length or strength, or even existence, of the sibling relationship at issue.

[187] *In re* Tamara R., 764 A.2d 844, 853 (Md. Ct. Spec. App. 2000) (noting that accepting this argument would "effectively create[] an irrebuttable presumption that visitation [is] not in the best interests of the child[].").

result, the court fashioned an equitable judicial model for analyzing third-party visitation petitions in the face of parental opposition.[188] The court read *Troxel* as requiring two elements to accord constitutionality to third-party visitation statutes: (1) "sufficient standards for courts to apply in evaluating a non-parent's claim for visitation" and (2) "sufficient deference to the parent's determination" within those standards.[189] As to the first element, the court proposed a pro-visitation best interests test, by which any evidence showing that preventing visitation would harm the dependent child would favor granting the petition.[190] As to the second element, the court instituted a rebuttable presumption that the parent opposes visitation only in his child's best interests; the third-party seeking visitation would have the burden of rebutting that presumption.[191] Using the elements, the court constructed a constitutional standard specific to matters of sibling visitation:

> [W]hether [a] the potential harm to [the dependent child] overcomes [b] the presumption arising from [the parent]'s determination that visitation is not in the best interests of [the siblings]. In order to do so, the court should consider [1] the nature and severity of the harm [to the child]if visitation is denied, as well as [2] [the parent]'s reasons for denying visitation.[192]

This standard meets the constitutionality requirements of *Troxel*[193] while equitably balancing the parent's rights with the rights of the child seeking visitation. Furthermore, it affords substantially more regard to the inherent value of undeveloped sibling relationships: It allows courts to evaluate a putative denial of visitation in terms of the harm the denial would cause, including that which a child would suffer in never benefitting from a relationship with his biological

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[188] *Id.* at 853. (Note that the "third-party" class *includes* siblings.)
[189] *Id.* at 852.
[190] *Id.* at 854.
[191] *Id.* at 853.
[192] *Id.* at 857.
[193] It does this by giving a measure of deference to a parent's determination that visitation is not in his child's best interests. *See* Troxel v. Granville, 530 U.S. 57, 69-70 (2000).

sibling(s). In addition, making parental opposition of visitation a consideration in the best interests analysis removes that consideration from the evaluation of the initial visitation petition. This diminishes arguments that more lenient jurisdictional provisions like Maryland's do not adequately safeguard parental prerogatives as to non-dependent siblings.[194] All of these factors would combine to give a child like Miguel a much greater chance of success on his visitation petition, without it having negative effects on any other process.

VI. Conclusion

Some individuals come into the world with no siblings preceding them, and grow up with no siblings following behind them. By most accounts, those individuals end up having missed out on a relationship that none other can replace, and to which none other can compare. Miguel entered the world with a brother preceding him. However, because of the missteps of their common biological mother in rearing Jose, Miguel's life began as if Jose had never come before him.

"When circumstances over which children have no control change, separating siblings and half-siblings seems inherently unfair."[195] Should it not follow that when circumstances over which children have no control arise, isolating siblings from one another is also inherently unfair? For children like Miguel, an affirmative answer will eventually become little more of an afterthought than the existence of his own brother. That is not fair to children like Miguel, or their brothers and sisters.

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[194] If these prerogatives are valid and compelling, courts will give them due weight in their elemental analysis of the visitation petition. If the child seeking visitation cannot overcome the prerogatives, the parents will succeed in preventing visitation.

[195] Westergaard, *supra* note 178, at 474.